PERBADANAN NASIONAL BHD A

v.

SHAHARIN SHAHARUDIN

HIGH COURT MALAYA, KUALA LUMPUR B
LAU BEE LAN J
[CIVIL SUIT NO: S22-839-2003]
31 MARCH 2011

CIVIL PROCEDURE: *Pleadings - Departure from - Defendant's case at trial differed from his pleaded case - Whether material departure - Whether defendant consistent in his stand all throughout - Effect of* C

CONTRACT: *Breach - Breach of duty - Defendant signing P4 and P5 - Whether exhibits executed without plaintiff's consent - Duties owed by defendant to plaintiff - Whether plaintiff suffered loss and damage - Evidence adduced - Whether plaintiff discharged burden of proving breach by defendant* D

CONTRACT: *Damages - Loss of profit - Whether proven - Effect of - Whether plaintiff made attempt to mitigate losses - Evidence adduced - Evaluation of* E

EVIDENCE: *Adverse inference - Plaintiff failing to call witnesses to show status and availability of documents - Reasons for the same - Whether explanations acceptable - Whether adverse inference drawn against plaintiff - Evidence Act 1950, s. 114(g)* F

EVIDENCE: *Burden of proof - Allegation of fact - Whether plaintiff aware of conversion to non-convertible Preference Shares - Whether plaintiff bears legal burden to prove allegation - Evidence Act 1950, s. 101(2)* G

In early 2001, En Amernodin ('proponent') proposed that the plaintiff invest in HK-Movie Entertainment Sdn Bhd ('HKM'). The defendant was the CEO and Director of the plaintiff company and a member of the plaintiff's Directors' Investment Committee ('DIC'). In March 2001, the plaintiff approved the investment in HKM as reflected in the minutes of meeting. An offer was then made to HKM ('original offer') and HKM made some amendments to it ('counter-offer'). In April 2001, the defendant issued a letter to HKM ('exh. P4') whereby the Preference Shares were changed H I

from Redeemable Convertible Preference Shares to Redeemable Non-Convertible Preference Shares with a nominal value of RM1 each. HKM accepted this change and sought a revised letter of offer from the plaintiff for its acceptance. In May 2001, the plaintiff, HKM, the proponent and Focal House Holding Sdn Bhd as the shareholder of HKM entered into a Subscription Agreement ('exh. P5') wherein the defendant signed on behalf of the plaintiff. There were two main issues which arose for determination before this court. The first was whether the defendant had issued exh. P4 unilaterally and without the knowledge or approval of the DIC and had breached his duties owed to the plaintiff, and if the first issue was answered in the negative, the second issue was whether the plaintiff had suffered any loss and damage as a result of the plaintiff's breach.

Held (dismissing the plaintiff's claim with costs):

(1) The plaintiff's case that the defendant had never obtained the approval from the DIC before committing them to the terms in exhs. P4 and P5 and that he had breached his duties and obligations towards them which had caused the plaintiff to suffer damages and loss, had not been proven on a balance of probability as firstly, the plaintiff's allegation had not been supported by any documentary evidence and had hence been an afterthought and secondly, because the plaintiff's allegation had not been supported by its witness PW1. On this ground alone, the plaintiff's claim ought to be dismissed. (paras 7-10)

(2) On the issue of the defendant's departure from his pleadings, the defendant had materially and consistently upheld and adduced in evidence at the trial, that exh. P4 had not been done unilaterally by him without the approval from the DIC. Thus, there had not been any material departure from the pleadings. Based on the factual matrix of the case and following the case of *Kumpulan Jerai Sdn Bhd (Rengam)*, "the evidence bearing (on the alleged defences) was not such a radical departure but a mere development of what was alleged by the defendant". (paras 13-14)

(3) On the weight to be given to the defendant's evidence regarding the circular resolution, the case of *RHB Bank Bhd* had been distinguishable. The plaintiff's statement that "... from a reading of the defendant's defence, there is a clear admission no approval of the DIC was sought or obtained

prior to him issuing exh. P4" had been misconceived and flawed. The defendant's version had been more probable. (paras 14-15)

(4) Following the principle in *Juahir Sadikon*, the defendant had been correct in submitting that there had been an admission by PW1 that exh. P3 had been forwarded to Khairul and Hanim, that they had been fully aware of the change to "non-convertible" Preference Shares, and that it had been incumbent on the plaintiff to have called them as witnesses. The legal burden had remained with the plaintiff to prove the allegations pleaded (s. 101(2) of the Evidence Act 1950) and had not shifted to the defendant. (para 17)

(5) In relation to the production of the Investment Guidelines applicable in 2001 and the minutes of the DIC held subsequent to the meeting in March 2001, they had been subject to the Defendant's Notice to Produce. Discounting what learned counsel for the plaintiff had said about insufficient time being given for the search of documents, they should have called witnesses to testify on the status and availability of the documents. In the absence of such evidence, the court had been left with no choice but to draw an adverse inference against the plaintiff for their failure to produce such material documents. (para 18)

(6) On the "lack of control" argument, the plaintiff's contentions could not be sustained and had been misconceived. Based on the evidence, the terms of the Subscription Agreement (including the non-convertible Preference Shares) had been in accordance with the plaintiff's objective and purpose to assist the proponent and not to take over control of HKM. (paras 20 & 22)

(7) On the assumption that the plaintiff had proven its case against the defendant (which they had not), they had still failed to adduce evidence to prove that they had suffered losses from their investments in HKM. If they had proven losses (which again they had not), they had failed to take steps to mitigate the alleged losses by enforcing the terms of the Subscription Agreement. (paras 23 & 24)

Case(s) referred to:

ABN-AMRO Bank Bhd v. Ismail Mydinsah [2005] 5 CLJ 1 HC ***(refd)***

Caley Ototo Worldwide Sdn Bhd v. Sun Wen Long [2010] 1 CLJ 725 HC ***(refd)***

Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 4 CLJ 1 CA ***(refd)***

National Union of Plantation Workers v. Kumpulan Jerai Sdn Bhd (Rengam) [2000] 1 CLJ 681 CA ***(refd)***

RHB Bank Bhd v. Kwan Chew Holdings Sdn Bhd [2010] 1 CLJ 665 FC ***(dist)***

Legislation referred to:

Evidence Act 1950, ss. 101(2), 114(g)

For the plaintiff - Alan Wong (Cliff Siow with him); M/s Zain Megat & Murad

For the defendant - Raymond Mah (CC Gan with him); M/s Mah Weng Kwai & Assocs

Reported by Sharmini Pillai

JUDGMENT

Lau Bee Lan J:

[1] In this suit, the plaintiff, Perbadanan Nasional Berhad, has pleaded that the defendant as the Chief Executive Officer ("CEO") and the Executive Director of the plaintiff company owes the plaintiff, *inter alia*, a fiduciary duty to do all such things in the best interest of the company and not to do anything that will prejudice the interest of the company.

[2] The defendant agrees that acting in such capacity he owed a fiduciary duty to the plaintiff but contends that the plaintiff has failed to adduce evidence that he has committed breach of such a duty but has acted in accordance with the Plaintiff's Investment Guidelines in good faith and in the best interest of the plaintiff company.

[3] At the trial, the plaintiff had one witness namely Tan Sri Dato' Mohd Desa bin Pachi, former Chairman of the plaintiff company (PW1) whilst the defendant had also one witness in the person of the plaintiff himself (DW1). Their witness statements marked as WSPW1 and WSDW1 respectively constitute the evidence in chief of these witnesses.

[4] The court has considered the plaintiff's written submission dated 8 November 2010 ("PWS"), the defendant's written submission dated 9 November 2010 ("DWS") and the oral reply thereto. The findings are set below.

[5] The salient facts which set in motion the plaintiff's claim against the defendant are as follows. In early 2001, the proponent, Encik Amernordin bin Osman proposed that the plaintiff invest in a company, HK-Movie Entertainment Sdn Bhd ("HKM"). As CEO and Executive Director of the plaintiff company the defendant was one of the members of the Directors' Investment Committee ("the DIC") of the plaintiff.

5.1 On 28 March 2001, the plaintiff in its 83rd DIC meeting, which was attended by the defendant, approved the investment in HKM on the following terms as reflected in the minutes of the meeting:

(a) subscription of 2 million ordinary shares at RM1 each in HKM representing 25% of the enlarged share capital of HKM; and

(b) subscription of 18 million Non-Cumulative 10% Fixed Dividend Redeemable Convertible Preference Shares at RM1 each at HKM.

(Exh. P1, bundle C2 pp. 1-2 at para. 3d and read with para. 3b).

5.2 By letter dated 28 March 2001 made an offer to HKM which set out the terms and conditions ("the original offer") and which was signed by the defendant (exh. P2, bundle C1 pp. 8-14). The terms set out in exh. P2 was accepted by the proponent and HKM on 11 April 2001.

5.3 On 5 April 2001 HKM *vide* its letter of even date (exh. P3, bundle C2 pp. 8-11) proposed some amendments in relation to the terms and conditions as set out in exh. P2 ("the counter-offer").

5.4 On 13 April 2001 the defendant issued the letter of even date to HKM (exh. P4, bundle C1 pp. 15-16) in response to the counter-offer whereby the Preference Shares were changed from Redeemable Convertible Preference Shares to Redeemable Non-Convertible Preference Shares with the nominal value of the preference shares to be maintained at RM1 each.

5.5 By a letter dated 17 April 2001 HKM accepted the recommendations set out in the exh. P4 and requested for the plaintiff to revert with the revised letter of offer for its acceptance (bundle C2 at p. 12).

5.6 On 10 May 2001, the plaintiff, HKM, the proponent and Focal House Holding Sdn Bhd being the shareholder of HKM entered into a Subscription Agreement (exh. P5 bundle C2 pp. 13-36). The defendant signed on behalf of the plaintiff.

Issues

[6] (i) The crux of the issue is whether the defendant has issued exh. P4 unilaterally and without the knowledge and approval of the DIC and has in turn breached his duties owed to the plaintiff; (ii) If the answer to (i) is in the negative, then the next issue is whether the plaintiff has suffered any loss and damage as a consequence of the plaintiff's breach.

Findings

No Approval Sought From The DIC

[7] The plaintiff's entire case is that the defendant never obtained the approval from the DIC before he committed the plaintiff to the terms under exhs. P4 and P5, thereby the defendant had breached his duties and obligations towards the plaintiff and caused the plaintiff to suffer damages and losses. The plaintiff submitted:

(a) (i) the DIC only approved the terms of the subscription contained in the offer letter, exh. P1 in that the Preference Shares to be subscribed were to be convertible in nature;

(ii) there was no DIC meeting fixed by the plaintiff to discuss the purported amendments to change the nature of the Preference Shares to be non-convertible in nature;

(b) Exhs. P4 and P5 were signed by the defendant as representative of the plaintiff; exh. P4 was issued without formal approval sought in any DIC meeting.

[8] I find there is merit in the defendant's contention that the allegations of the plaintiff has not been proven on a balance of probabilities for the following reasons.

8.1 Firstly, the plaintiff's allegation is not supported by any documentary evidence because despite the serious allegations made against the plaintiff in this claim, no letter of complaint or any disciplinary action was taken against the defendant in respect of exh. P4. This is confirmed by PW1, who was the Chairman of the plaintiff company between May 2000 to December 2004 at the material time:

Q: Between the date of this letter 13.4.2001 and the Defendant left the Company on October 2001, there were no letter of complaint and no disciplinary action taken against the Defendant in respect of the issuing of this letter. Do you agree?

A: Yes, as far as I am aware.

Q: Can you confirm there was no complaint by the Plaintiff's company in respect of this letter until the filing of this suit in 2003.

A: Yes.

8.2 In the circumstances the court is inclined to agree with the defendant that the plaintiff's claim is but a mere afterthought.

[9] Secondly, the plaintiff's allegation is not supported by PW1, the plaintiff's sole witness. An analysis of PW1's evidence shows that his evidence on whether exh. P4 was issued with the knowledge and approval of the DIC is inconclusive and uncertain:

Q: Was this letter [Exhibit P3] ever brought to your attention?

A: I cannot recall. [Q&A13 PWS1]

Q: Was HME's proposal for amendments to the terms and conditions of investment discussed at any meeting of the Directors Investment Committee?

A: I cannot recall. [Q&A14 PWS1]

Q: Were you aware that the said letter dated 13.04.2001 [Exhibit P4] was issued by the Defendant for and on behalf of the Plaintiff Company?

A: I cannot recall that it was brought to my attention. [Q&A19 PWS1].

A 9.1 It is observed these are answers of PW1 given in examination in chief. It begs the question as to whether such evidence has any probative value at all as the repeated answers "I cannot recall" as correctly submitted by the learned counsel for the defendant are no better than "I am not sure" or "maybe or B maybe not". I am of the view no weight ought to be attached to these answers as it neither proves the plaintiff's case nor disproves the defendant's defence.

9.2 Further PW1 in Q&A21WSPW1 said:

C Q: To the best of your knowledge, did the Directors Investment Committee approve the investment in the Preference Shares of HME to be changed from "convertible" to non-convertible?

D A: Not that I am aware of.

9.3 The answer "Not that I am aware of" is equivocal and implies that the DIC could have approved the investment in non-convertible shares but without the knowledge of PW1. In fact PW1 in cross-examination admitted of such a possibility:

E Q: I put it to you that this letter [Exh. P4] was issued by the Plaintiff company after the recommendation by the management was accepted by the Directors' Investment Committee. You agree?

F A: I cannot recall.

Q: Since you cannot recall approving the recommendation or considered the recommendation, do you agree this could be one decision taken by the Investment Committee in your absence by the majority of the remaining members? Is it G possible?

A: It could happen.

[10] Thus based on evidence of PW1 alone even if the defendant H opted not to call the defendant to testify, I am persuaded by the argument of the learned counsel for the defendant that the plaintiff has failed to discharge its burden of proving that exh. P4 was issued without the approval of the DIC and on this ground alone, the court is entitled to dismiss the plaintiff's claim.

I **[11]** Be that as it may, I shall now address the evidence of DW1 and other pertinent issues raised by the parties in the submissions.

Defendant's Contention Not Denied By PW1

11.1 With regard to the counter-offer of HKM, DW1 said he referred the same to the Plaintiff's Investment Project Team and Legal Department which thereafter prepared the counter-proposal (exh. P4). DW1 also said that exh. P4 was circulated by the company secretary and Head of Legal Department, Cik Mislina Hanim to the DIC and approved by way of a circular resolution which was recorded and ratified at the next DIC meeting.

11.2 When the defendant's case was put to PW1 in cross-examination, PW1 did not deny these contentions:

Q: I put it to you that this counter proposal [Exhibit P4] and recommendations were considered by the directors by way of circular resolution. You agree?

A: I cannot recall.

Q: I put to you that the Project Investment Team and Legal Department did consider this letter and that their recommendations were forwarded to the Committee for approval, do you agree?

A: I cannot recall.

Q: I put to you that the Committee did accept the recommendations made by the Investment Team and Legal Department on the counter-offer:

A: I disagree.

Q: Earlier you told us that you cannot recall the recommendation, but now you say that you disagree having approved. Surely your answer would be I cannot recall whether approval was given.

A: I cannot agree to something I cannot recall.

Q: I put it to you that the recommendation by the Project Investment Team and Legal Department on the counter proposal here by HKM was subsequently recorded and ratify at the subsequent DIC meeting?

A: I cannot recall.

A **Defendant Followed The Investment Guidelines**

[12] DW1 in both examination in chief stated that the applications for investments were processed according to the Plaintiff's Investment Guidelines whereby HKM's counter-offer (exh. P3) was referred to the Project Investment Team and Legal Department. Under cross-examination, I find DW1 did not waiver but maintained his stand as is evident from the following Q&A(s):

(a) Q: The 1st step is when the Plaintiff's company received this letter [Exh. P3] according to the Guidelines, this letter would be considered by the Project Investment Team and Legal Department so that they can make recommendations to the Board according to the Guidelines?

A: Yes, it would be.

(b) Q: It is your evidence that you referred Exhibit P3 to the Project Team?

A: Yes. It is the guidelines that it has to go to the Project Team and be vetted by the Legal Team.

Q: You agreed to change the nature of the preference shares even when it was not requested for?

A: Yes, it was the result of the recommendations made by the Investment Project Team and Legal Department.

Q: Your decision was based on what Khairul and Hanim advised you?

A: Yes.

Q: If they advised you wrongly, your explanation would fall?

A: I don't think it was wrong advice.

12.1 When DW1 was challenged that he did not obtain the approval of the DIC before issuing exh. P4, DW1 emphatically disagreed:

Q: I put it to you that you never obtained approval from the Directors' Investment Committee before issuing Exh. P4?

A: No.

Defendant's Departure From Pleadings?

[13] The plaintiff submitted the aforesaid evidence led by the defendant at the trial differed from his pleaded case in relation to the DIC's approval for the amendment to the subscription of Preference Shares (paras. 12 to 18 of the statement of defence):

(a) HKM had counter-proposed in Exhibit "P-3" to make some amendments on the terms of the agreement;

(b) The Defendant, upon receipt of the counter proposal by HKM, referred the same to the Plaintiff's Investment Project Team and the Plaintiff's Legal Department ("the Project and Legal Team");

(c) Since the subscription of the HKM shares was not to control HKM, as represented by the Project and Legal Team, the Defendant issued the Exhibit "P-4";

(d) The Defendant thereafter informed and/or disclosed to the DIC and/or the Board of Directors of the proposed amendments in Exhibit "P-3", and the same was subsequently ratified by the DIC and/or the Board of Directors.

13.1 Basically the plaintiff's bone of contention is there was no specific pleading by the defendant as to how and when the approval for amendment was obtained; whilst pleading "he informed and/or disclosed to the DIC and/or the Board of Directors the receipt of exh. P3 after he issued out exh. P4", at the trial DW1 stated "exh. P3 was circulated to the members of the DIC by the corporate secretary and the approval for the amendments was obtained by way of a circular resolution of the DIC prior to the issuance of exh. P4".

13.2 In this regard the plaintiff urged the court to reject the evidence of the defendant adduced during trial as it was not pleaded and is irrelevant citing the case of *RHB Bank Bhd v. Kwan Chew Holdings Sdn Bhd* [2010] 1 CLJ 665 paras. 33-35 at pp. 670-680.

[14] For clarity para. 17 of the statement of defence is reproduced:

The Defendant thereafter informed and/or disclosed to the [DIC] and/or the Board of Directors of the Plaintiff of the Letter of Proposed Amendment dated 13.4.2001 [Exh.P4] and/or the amendments made to the terms of investment in HKM. The [DIC] and/or the Board of Directors of the Plaintiff subsequently ratified the Defendant's Letter of Proposed Amendment dated 13.4.2001 and /or the amendments made to the terms of investment in HKM. (emphasis added)

14.1 I am of the view that the plaintiff's contention cannot be sustained. What is material and consistently upheld by the defendant as pleaded and adduced in evidence at the trial is exh. P4 was not done unilaterally by DW1 and without the approval from the DIC. In his testimony at the trial what the DW1 sought to explain was how the DIC was informed ie, by way of a circular resolution. I agreed with the learned counsel for the defendant there is no material departure from the pleadings. Support is drawn from the case of *National Union of Plantation Workers v. Kumpulan Jerai Sdn Bhd (Rengam)* [2000] 1 CLJ 681 where the Court of Appeal refused to accept the contention of counsel for KJSB that the issue of condonation should not be considered as it was not pleaded in the statement of case and at p. 689 a-e held "... **evidence bearing** on the two alleged defences (issue of condonation) **was not such a radical departure but a mere development of what had been alleged by the defendants.** Therefore, although the two alleged defences were material facts which ought to be pleaded, such a non-radical departure was waived or inferentially consented to when the evidence was adduced without objection by the plaintiffs. (emphasis added)

14.2 As I have alluded to before, in this instant case, the issue of acting unilaterally and without getting the approval of the DIC remained central and consistent throughout, be it in the pleading or as evidence adduced during the trial. I am of the view that counsel for the plaintiff did not raise an objection *per se* but merely cross-examined on the circular resolution, *inter alia*:

Q: Do you agree that paragraph 13-17 of Defence, there is no mention of a circular resolution?

A: Yes.

Q: Are you familiar with the Notice to Produce marked "G" issued by your solicitors. In this Notice there is no mention of any circular resolution? A

A: Yes, there is no mention in this document that there was a circular resolution.

Q: Nothing more than an afterthought? B

A: No.

14.3 Based on the factual matrix of this case and following the case of *Kumpulan Jerai Sdn Bhd (Rengam) (supra)*, I hold "the evidence bearing (on the alleged defences) was not such a radical departure but a mere development of what was alleged by the defendant". What is material now is the determination of the weight to be accorded to DW1's evidence regarding the circular resolution thereof. C D

14.4 As for the case of *RHB Bank Bhd (supra)* it is distinguishable. At para. 33 the Federal Court observed that whilst the respondent's cause of action against the appellant was for breach of contract, nowhere in the respondent's pleading, expressly or by implication, the Federal Court could detect a claim for breach of a joint venture agreement arising out of a fiduciary duty placed upon the appellant in the capacity as principal of an agent, hence the finding that the proposition of the Court of Appeal was not even pleaded by the respondent. E F

Testimony Of The Defendant – Whether Doubtful And Inconsistent

[15] The plaintiff submitted DW1's evidence was inconsistent and doubtful as: G

(i) the defendant during cross-examination admitted that the Project and Legal team would report and seek instructions from him in the course of business; H

(ii) the defendant admitted he received exh. P3 which was addressed for his attention as CEO; it was illogical for the defendant to have left the entire negotiation, dealings and decision making process to the Project and Legal team when he was the one whom exh. P3 was addressed to and also issued exhs. P4 and P5; on a balance of probabilities the latter acted on the defendant's instruction; I

A (iii) in cross-examination, when queried whether he checked whether the proponent was aware of the proposal for amendment, the defendant said "At this juncture, the responsibility to check with the proponent was still vested in the Project team and it is not with me. I did not check
B because it was the responsibility of the project team to do groundwork". The defendant's oral testimony was "self-serving" in nature and an attempt to shift the blame to the Project and Legal team and none of the members of the said team were called to testify;

C

(iv) the defendant said the amendments were made for the purpose of the negotiation of the deal in some sort of "give and take" bargaining so that the proponent's interest would not be in vain. It appeared the negotiations took place
D only between the defendant and HKM as the proponent had signed and agreed to the original terms (exh. P2) after HKM's letter (exh. P3) and two days before the defendant issued exh. P4 which was not carbon copied to the proponent;

E

(v) in cross-examination, when queried whether he checked whether the proponent was aware of the proposal for amendment, the defendant said "At this juncture, the responsibility to check with the proponent was still vested in the Project team and it is not with me. I did not check
F because it was the responsibility of the project team to do groundwork."

15.1 The plaintiff submitted that the reasons for the amendment given by the defendant should not be accepted as the
G defendant did not understand the amendments and the purpose thereof before he issued exh. P4 eg, (i) did not understand the relationship between paid-up capital and preference shares; (ii) the basis of the amendments; (iii) did not know that the RM18 million shares cannot be utilized if
H the same did not form part of the paid-up capital; (iv) his decision was based on the advice of the Project and Legal team and if their advice was wrong, then his explanation for the amendment would fall.

I 15.2 The plaintiff further submitted the defendant failed to adduce any evidence to show how the approval of the DIC was given before he issued exh. P4 and executed exh. P5. I am of the view the statement of the plaintiff "... from a reading

of the defendant's defence, there is clear admission no approval of the DIC was sought or obtained prior to him issuing exh. "P4" (para. 27 PWS) is misconceived and flawed. Contrary to what the plaintiff wants the court to believe, on a balance of probabilities I find the defendant's version as more probable for the following reasons. Firstly, I adopt what I have stated above in paras. 11 and 12 and the subparagraphs therein ie, (i) PW1 did not deny the contentions of the defendant regarding exh. P4 and the recommendations of the Project and Legal team were forwarded to the DIC by circular resolution and were subsequently recorded and ratified at a subsequent DIC meeting; and (ii) the defendant followed the relevant Investment Guidelines.

15.3 Secondly, apart from the evidence adduced that exh. P3 was forwarded to Encik Khairul Azizi, Project Manager from the Investment Project team and Cik Mislina Hanim, Head of the Legal Department, both of them were fully aware of the change from "convertible" to "non-convertible" Preference Shares. PW1 admitted this to be so as can be gathered from his evidence during cross-examination:

Q: Can I refer you to the subsequent agreement which is Exhibit P5 on page 13 of Bundle C2. Can you confirm that this agreement was prepared by the lawyers who are stated in the front page, Messrs Aziz & Mazlan?

A: Yes.

Q: Can you confirm that these were lawyers appointed by PNS?

A: I think so.

Q: Can you confirm it was also the Investment Project Team and Legal Department who would have given instructions to Aziz & Mazlan to prepare this document?

A: I agree.

Q: I want to point you to your answer in Q23 of your witness statement. This was also stated on page 15 at paragraph 3 of the Shares Subscription Agreement and again on page 17 under the definition of Preference Shares. If the Project Investment Team and Legal Department were the ones giving instructions to Messrs Aziz & Mazlan to prepare this agreement, surely the

A Project Investment Team and Legal Department would be well aware of the non-convertible nature of the Preference Shares to be held by the Company in HKM. You agree?

A: Yes, they will be aware of it.

B

Q: Refer to Page 35 of Bundle C2. Can you confirm that this agreement was executed on behalf of the Plaintiff's company by the Defendant as the Director and by the company secretary, Ms Mislina Hanim?

C A: Yes, it is under the common seal.

Q: Then surely you would agree Ms Mislina Hanim would have been aware of all the terms as stated in the Shares Agreement.

D A: That is right.

15.4 Thirdly, the plaintiff pleaded that its rights were "weakened/reduced as a result of the plaintiff's investment in non-convertible Preference Shares is not borne out by evidence. E When asked "Why was the approved investment by way of "convertible" instead of "non-convertible" Preference Shares" (Q&A24 WSPW1) or in other words on the effect of the "non-convertible" Preference Shares, all PW1 said was:

F A24 Those were the terms that were recommended by the management and approved by the Directors Investment Committee for the best interest of the company.

15.5 PW1 did not explain how the "non-convertible" nature of the G Preference Shares "weakened/reduced" the plaintiff's rights to its investment in HKM. However the DW1 explained the reason for the change (Q&A16 WSDW1):

Q16: What was the Plaintiff's response to the counter-proposal?

H A16: ... In response to HKM's counter-proposal to reduce the nominal value of the Plaintiff's convertible redeemable Preference Shares, the Investment Project Team and Legal Department decided to maintain the nominal value of the Preference Shares at RM1.00 but to change the type of the Preference Shares to be purchased from convertible to non-convertible. This was done to address the concern of HKM that the paid-up capital would increase by RM18,000,000 should the Preference Shares

I

be converted into Ordinary Shares. I was informed by Cik Mislina Hanim, Head of the Legal Department and Encik Khairul Azizi, the Project Manager from the Investment Project Team that since the sole purpose of the Plaintiff in subscribing for the shares in HKM was not to control HKM but only to assist the Proponent in participating in the equity of HKM, the change in the type of Preference Shares to non-convertible was not an issue and would not prejudice the Plaintiff …

15.6 In re-examination, DW1 amplified on the negotiation process which led to the amendments:

Q: The result of the change from convertible to non-convertible was part of the negotiation process. Now, my question is can you explain to the court what were the parties concerns or objectives both on part of HKM and the Plaintiff in the negotiation process that led to the change in the convertible nature of the Preference Shares.

A: There were a couple of concerns especially after we received the counter proposal. Definitely after on the part of HKM their concern was definitely the control of the company. HKM concerns is the Plaintiff controlling the company. Based on that concern, that is the reason why on the part of the Plaintiff because the purpose is not to control the company, the purpose is to help then Proponent to invest in the company and to make sure the concern is that whatever is invest in able to recoup. By then, we will come out with give and take. HKM wanted to do away with personal guarantees but we say no. Personal guarantee must be there. In order not to sour the negotiation, we somehow change and recommended the Project Team to change from convertible to non-convertible. We are also looking at that particular point in time, we are also looking at dividend of 10%. In terms of dividends payment, in the event of recalling by being non-convertible, Plaintiff is able to recoup in full rather than half of it has invested in the company rather than getting half of it.

15.7 In cross-examination DW1 disagreed with the plaintiff's proposition that he had caused the plaintiff to enter into a "lesser bargain" by changing the nature of the shares from convertible to non-convertible. I find the plaintiff's contentions of the defendant's lack of knowledge on the nature of preference shares and of the purpose of the amendments before he issued exh. P4 does not detract from

A the fact that the plaintiff has failed to prove the "non-convertible" nature of the Preference Shares was prejudicial to the plaintiff.

Failure Of The Defendant To Discharge His Evidential
B **Burden To Prove His Defence Or Adverse Inference To Be Imputed Against The Plaintiff**

[16] The plaintiff contended the onus is on the defendant to adduce evidence to prove his allegations namely, (a) to apply for discovery of the Investment Guidelines applicable for the year
C 2000 to 2001, the Minutes of Directors' Meeting which he alleged approved the plaintiff's letter of 13 April 2001 (exh. P4) and the circular resolution signed by himself and the DIC members; (b) obtain the contacts of the relevant witnesses namely, Mislina Hanim and Khairul Azizi.
D

16.1 The defendant's solicitors had served a Notice to Produce dated 23 September 2010 particularly for the original copies of the Investment Guidelines applicable for the year 2000 to 2001 and the Minutes of Directors' Meeting which approved
E the plaintiff's letter of 13 April 2001 (exh. P4); but it was about three weeks before trial and there was insufficient for the plaintiff to go through the records of the plaintiff which had been put in storage.

F 16.2 An adverse inference should be drawn against the defendant rather than the plaintiff as the action was filed some seven years ago but the request to produce documents was made only about three weeks before trial (See *Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627
G (CA) at pp. 627 and 628 Held 2).

[17] Both counsel for the parties relied on the case of *Juahir Sadikon (supra)*. In this case, the respondent developed a piece of land into a housing estate and built low cost houses ("the
H premises") and rented them out. The appellant was one of the occupiers of the premises. The terms and conditions of the appellant's tenancy was governed by a tenancy agreement which included an option to purchase the premises on completion of a period of tenancy of three years at a price to be determined by
I the respondent. The appellant exercised his option to purchase the premises and the respondent offered to sell the premises for a sum of RM14,000. However the appellant rejected the offer on the basis that it was not in compliance with an oral representation

made by one Tan Sri Basir, the representative of the respondent at a meeting together with other officers of the respondent and a member of the state legislative assembly (PW2) which was held for the purpose of discussing the option where the purchase price was quoted between RM7,000-8,000. Consequently the respondent withdrew this offer for sale. The respondent gave the appellant notice to quit twice. The appellant who has yet to give up possession claimed, *inter alia*, for (i) a declaration that he was entitled to purchase and the respondent was obligated to sell the premises to him; (ii) specific performance of the tenancy agreement; (iii) damages in addition to or *in lieu* of specific performance; and (iv) an injunction restraining the respondent from evicting him from the premises. Whilst denying liability to the appellant's claims, the respondent counterclaimed for arrears of rental, vacant possession of the premises and mesne profits. The trial judge dismissed the appellant's claim and allowed the respondent's counterclaim. On appeal, it was the appellant's contention that the respondent was contractually bound to sell the premises to him at the purchase price of between RM7,000-RM8,000 and not at RM14,000 by virtue of the oral representation made by Tan Sri Basir. The appellant failed to serve the subpoena on Tan Sri Basir. The issues are (i) whether Tan Sri Basir made the representation?; (ii) if so, whether the burden shifted to the respondent when the appellant failed to serve the subpoena on Tan Sri Basir; (iii) whether adverse inference under s. 114(g) of the Evidence Act 1950 could be invoked against the respondent; and (iv) whether the counterclaim had been proved against the appellant.

(See headnotes at pp. 627-628).

17.1 On the (ii) and (iii) issues, at p. 635 of the report, the Court of Appeal stated:

> The allegation of the oral representation has been pleaded by the appellant at para 8 of his statement of claim, and denied by the respondent at para 5(a) of its amended statement of defence.
>
> He who alleges must prove such allegation and the onus is on the appellant to do so. See s. 103 of the Act. Thus, it is incumbent upon the appellant to produce Tan Sri Basir as his witness to prove the allegation. The fact that the appellant was unable to secure the attendance of Tan Sri Basir as a witness does not shift the burden to the

A respondent to produce the witness and testify as to what he had uttered, as firstly, the respondent never raised such an allegation and, secondly, has denied even making one. For this very reason, the adverse inference under s. 114(g) of the Act relied upon by the appellant cannot be accepted as establishing that if the witness had been produced, his evidence would work against the respondent. There is no obligation in law for the respondent to produce the witness as that obligation rests with the appellant, the party who alleges, and the fact that the appellant was unable to do so is fatal to his case. For this very reason too, the adverse inference under s. 114(g) is invoked against the appellant.

17.2 Following the principle in *Juahir Sadikon (supra)*, I find the plaintiff's aforesaid contentions (paras 16-16.2) bear no merit. The learned counsel for the defendant is correct when submitting there is admission by PW1 that (a) Exh. P3 had been forwarded to Khairul and Hanim and (b) they were fully aware of the change to "non-convertible" Preference Shares, therefore it is incumbent for the plaintiff to call either Khairul or Hanim as witnesses to support the plaintiff's allegations:

(a) the defendant unilaterally and without the knowledge and approval of the DIC changed the Preference Shares to "non-convertible"; and

(b) the change to "non-convertible" Preference Shares was prejudicial to the plaintiff or weakened/reduced the plaintiff's rights to its investment in HKM.

17.3 The legal burden remains with the plaintiff to prove the allegations pleaded (s. 101(2) of the Evidence Act) and does not shift to the defendant at all. To borrow the words of Abdul Malik Ishak J (now JCA) in *Caley Ototo Worldwide Sdn Bhd v. Sun Wen Long* [2010] 1 CLJ 725 at p. 740 "... no adverse inference ought to be drawn against the defendant because the burden of proof remains with the plaintiff throughout the trial and that the defendant was in a better position to decide whether he had enough evidence to defeat the plaintiff's claim."

17.4 In the case of *ABN-AMRO Bank Bhd v. Ismail Mydinsah* [2005] 5 CLJ 1 cited by the defendant, the plaintiff's claim arose from the granting of banking facilities to the defendant for which the bank did not give any plausible reason as to

why it did not secure the two properties pledged to it. The defendant admitted that he had defaulted in the payment towards the facilities but raised in defence that a scam was perpetrated by the plaintiff's officer, one Mr. Vega, who had defendant's properties transferred to himself for a nominal purchase price which was below the market rate in exchange for him getting the facilities approved by the plaintiff. The High Court drew an adverse inference against the plaintiff for failing to call Mr. Vega as a witness and at pp. 6-7 of the report stated:

> It is clear that the Bank owed a duty to dispel the allegations contained in the pleadings by calling Vega. By not doing so, this Court must invoke s. 114(g) of the Evidence Act 1950 against the Plaintiff and hold that if the Plaintiff had called Vega, his evidence would have been unfavourable to the Plaintiff.

17.5 Similarly, transposed to the instant case, the defendant has given evidence that Hanim circulated the amendment to the original offer (exh. P4) by way of circular resolution to the Directors. The burden is on the plaintiff to call Hanim to dispel the defendant's defence; the plaintiff's failure to do so gives rise to an adverse inference that if called, her evidence would not be in favour of the plaintiff.

[18] DW1 had testified the circular resolution and the minutes of the DIC meeting held subsequent to the 83rd meeting on 28 March 2001 would be in the plaintiff's records. As far as the production of the Investment Guidelines applicable in 2001 and the minutes of the DIC held subsequent to the 83rd meeting on 28 March 2001, in my judgment, they were subject to the Defendant's Notice to Produce. Discounting what the learned counsel for the plaintiff said about insufficient time being given for search of the documents, the least the plaintiff should have done was to call a witness to testify on the status and availability of the documents ie, where such documents were kept, efforts made by the plaintiff to retrieve the said documents, if any. In the absence of such evidence the court is left with no choice but to draw an adverse inference against the plaintiff for failure to produce such material documents.

A **"Lack Of Control" Argument Is Misconceived**

[19] Assuming the plaintiff has proven its case against the defendant (which I hold otherwise) the plaintiff submitted the defendant's breach has caused:

B

(a) the Put and Call option in relation to RM18 million of Preference Shares (exh. P5) to be rendered academic and non-exercisable as only ordinary shares can be put to the proponent and the RM18 million of Preference Shares were no longer convertible to ordinary shares;

C

(b) since the Preference Shares subscribed cannot be converted to ordinary shares, the plaintiff cannot gain control over HKM as majority shareholders because Preference Shares do not have voting rights.

D

19.1 The plaintiff thereby submitted the defendant, in breach of his duties as CEO and ED ought to bear the sum of RM18 million being the price of subscribing the deal without approval of the plaintiff.

E

[20] I am of the view the plaintiff's contentions cannot be sustained. Firstly, the plaintiff's argument that the change to non-convertible Preference Shares caused the plaintiff to lose control over HKM is in my view misconceived for the reasons submitted on the defendant's behalf:

F

(a) The Plaintiff would not have been able to obtain control over HKM even if the Preference Shares had been convertible in nature because Clause 3.1(h) of Exhibit P2 would only have allowed the Plaintiff to convert its Preference Shares to Ordinary Shares after the expiry of 2 years, ie, after 10.5.2003. This was admitted by PW1 in cross-examination;

G

(b) Notwithstanding, the Plaintiff having filed this suit on 25.6.2003 is claiming for losses which it was supposed to have suffered during this 2 year period.

H

Sufficient Safeguards In The Subscription Agreement

[21] Secondly, there are sufficient safeguards in the Subscription Agreement to ensure the plaintiff does not suffer any losses in its investment in HKM. DW1 referred to the safeguards as (Q&A24 WSDW1):

I

(a) The Plaintiff would secure a fixed return of 10% on its Ordinary and Preference Shares in HKM [Section 4.01(19)(iv) and (v) of Exhibit P5 of Bundle C2]; A

(b) HKM could not issue any further shares in HKM to rank in dividends or capital over the Plaintiff's Preference Shares [Section 5.06 of Exhibit P5 of Bundle C2]; B

(c) Dato' Yip Yee Foo and Dato' Chung Wai Meng, the shareholders of Focal House Holding Sdn Bhd would provide the Plaintiff with personal guarantees [Section 4.01(19) of Exhibit P5 of Bundle C2] on the following: C

(i) the payment for the Buy-Back of the Ordinary Shares by the Proponent;

(ii) the redemption of the Preference Shares from the Plaintiff by HKM; D

(iii) HKM is to achieve the profit forecast during the tenure of Plaintiff's investment;

(iv) the payment by HKM of the dividend on the Ordinary Shares of 10% based on the enlarged share capital of HKM; and E

(v) the payment by HKM of the fixed dividend of 10% on the Preference Shares during the tenure of the Plaintiff's investment.

(d) The Plaintiff would be able to participate in the affairs of HKM by way of being represented on the Board of Directors of HKM [Section 7.01(1)(iv) of Exhibit P5 of Bundle C2]; and F

(e) HKM would pay RM100,000.00 as monitoring fees to the Plaintiff [Section 4.01(9) of Exhibit P5 of Bundle C2]. G

Subscription Agreement Consistent With The Plaintiff's Purpose

[22] *Vide* Q&A4 WSDW1, the defendant testified: H

Q4: What was the objective of the Plaintiff's equity investment scheme?

A4: The Plaintiff's equity investment scheme was introduced to support the government's efforts in increasing the Bumiputra's equity and participation in established non-Bumiputra companies that were entitled for listing on Bursa Malaysia. The Plaintiff was to promote active participation of I

middle-level Bumiputra in competitive industries. Another objective was to allow middle-level Bumiputra to enhance his/her experience in the management and operation of a company with the potential of going for Initial Public Offering (IPO). The Plaintiff provides funding for Bumiputra proponents to participate in the equity of such non-Bumiputra companies.

22.1 PW1 admitted in cross-examination that the plaintiff's objective was not to take control of companies in which it invested:

Q: Can you agree that it was not the intention of the Directors' Investment Committee to take control of HKM? Do you Agree?

A: It would seem so, yes.

Q: Can you agree it is the Plaintiff's company policy to invest in companies and not to take control of companies?

A: Under normal circumstances, yes.

Q: Agree that PNS policy not to take over this company is reflected in the terms of the letter of offer. I want to refer you to 2 clauses of the letter specifically refer you to Clause (d): Call Option at Page 9, para 3.1(c). Do you agree that by this Call Option the proponent has the right to buy back from the Plaintiff this Company, 75% in its total shareholding in HKM?

A: Yes.

Q: It also means that the Proponent were to exercise its right to buy back then Plaintiff were to effectively give up his shares in HKM?

A: The objective is to help the Bumiputra to own the Company.

Q: I also want to refer you to para (g) at page 10: Put Option. By this Put Option, do you agree that the Proponent is obliged to purchase from the Plaintiff's company 100% of PNS shareholding in HKM?

A: That is right.

Q: Do you agree that purpose of these terms and clauses were really to assist the proponent to invest in HKM and not to take control of HKM?

A: Under normal circumstances, yes.

22.2 Based on the evidence I find the terms of the Subscription Agreement (including the non-convertible Preference Shares) were in accordance with the plaintiff's objective and purpose to assist the proponent and not to take control of HKM.

[23] On the assumption the plaintiff has proven its case against the defendant (which I hold otherwise) I am in agreement with the defendant that the plaintiff has failed to adduce any evidence to prove that the plaintiff suffered losses from its investment in HKM. It is trite law that the plaintiff bears the burden of proving its damages. PW1 made no mention of any damages suffered by the plaintiff. Neither did the plaintiff tender any documentary evidence to prove a loss of RM18 million nor proof of loss of matters averred in para. 23 of the statement of claim caused by HKM's breach:

(a) in failing to pay fixed dividends of 10% per annum which has to be paid every six months on 30 June and 31 December;

(b) in failing to redeem the whole of the Preferred Shares from the plaintiff;

(c) its undertaking to preserve and maintain its property and assets whereby HKM gave a loan of RM3 million to Dat Lee Credit Sdn Bhd.

[24] In the event there is proof of losses (there is none), the defendant is correct in submitting that the plaintiff did not take steps to mitigate its alleged losses by enforcing the terms of the Subscription Agreement. This is evident from the admission made by PW1 through the thorough cross-examination by the learned counsel for the defendant:

Q: What does it mean to redeem a Preference Shares?

A: Give up your shares and get money back.

Q: Can I refer you to Section 5.05 of the Shares Subscription Agreement at Page 25 of Bundle C2 under Redemption of Preference Shares. Is this what you were referring to when you said redeeming Preference Shares?

A: It seems to be.

Q: According to this Section 5.05, the company can redeem the entire or part of its Preference Shares within a 2 year period.

A: That is right.

Q: Can you confirm that HKM has not redeemed?

A: Not that I aware of.

Q: And if the company chose to redeem its shares pursuant to this section, this would mean that the Plaintiff's company would give up its Preference Shares and HKM will pay the Plaintiff's company RM18 million.

A: That is right.

Q: Under subsection (1) of Section 5.05 at Page 25 of Bundle C2, can you confirm HKM has not redeemed any of the shares – the RM18 million shares?

A: Not that I am aware of.

Q: Under subsection (ii). Under certain circumstances, PNS has the right to call upon the Company to redeem the Preference Shares. Can you confirm no such Call was made by PNS?

A: Not that I'm aware of.

Q: Refer to Section 10.01 at Page 32 of Bundle C2: Put Option. Can you confirm that PNS did not exercise this Put Option?

A: Not that I'm aware of.

Q: You agree that PNS could have recovered this 1.5 million by giving up its Ordinary Shares when exercising its Put Option?

A: It would be.

Q: You agree that these two clauses is part of a scheme of arrangement to safeguard the investment in HKM?

A: It would be.

Q: In Section 4.01, paragraph 19 at Page 23 of Bundle C2. You confirm that this clause in the Shares Agreement requires the promoters of HKM, one Dato' Yip Yee Foo and one Dato' Chung Wai Meng to give Plaintiff's company personal guarantees on certain items.

A: As per the agreement, yes.

Q: Can you confirm that no steps taken by the Plaintiff's company to enforce this personal guarantee against both these promoters? A

A: Not that I am aware of.

Q: Refer to Section 7.01(1)(iv) at page 29 of Bundle C2. Agree that Plaintiff was entitled to have representative on the Board of Directors of HKM to monitor the activities. B

A: Yes, as agreed.

Q: Who represented PNS on the Board of HKM? C

A: I cannot recall.

Q: Did the Plaintiff's company made any effort to procure the attendance of this person as representative as witness at today's trial? D

A: I am not aware.

Q: Section 4.01(9) at page 22 of Bundle C2. Do you agree that the Plaintiff's company was paid RM100,000.00 by HKM for monitoring fees and to cover the costs of the Plaintiff's monitoring the activities in HKM? E

A: Yes, as per the agreement.

Q: Can you recall what efforts or steps taken by the company to monitor the activities of HKM to justify the payment of RM100,000.00? F

A: Not that I am aware of.

Conclusion

G

[25] For the foregoing reasons on a balance of probabilities I find the plaintiff has not proven its claim and the plaintiff's claim is dismissed with costs fixed at RM40,000.

H

I